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Freedom of private
property on the sea from
capture during war

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A LETTER ADDRESSED

TO

CAPTAIN A. T. MAHAN

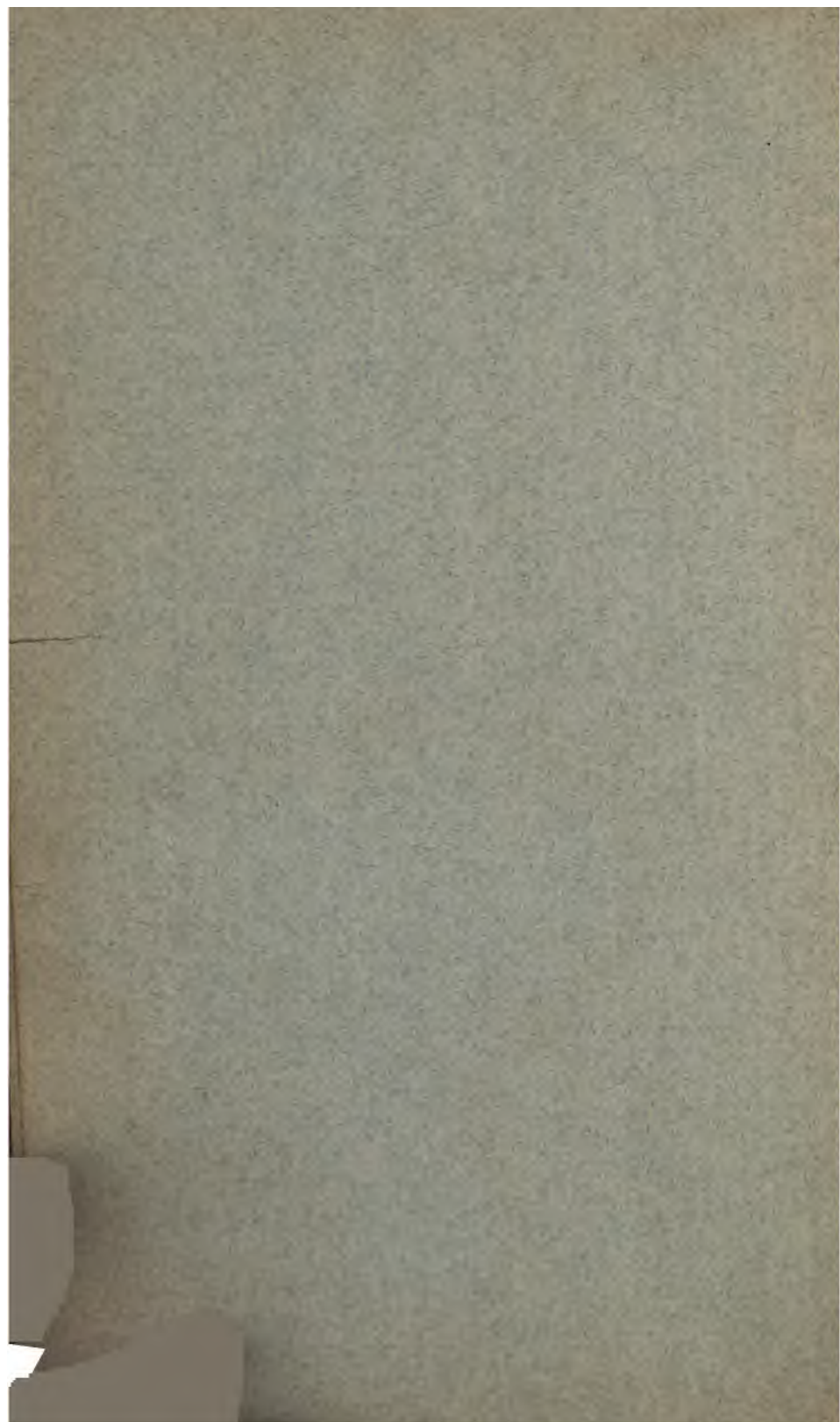
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IN REGARD TO

FREEDOM OF PRIVATE PROPERTY ON THE SEA
FROM CAPTURE DURING WAR.

BY CHARLES HENRY BUTLER.

WASHINGTON, D. C., NOVEMBER 24, 1898.



Washington, D. C., November 24, 1898.

Capt. A. T. Mahan.

My Dear Sir: I have read with great interest your letter recently published in the New York Times, in which you state that, while the idea of promoting the freedom from capture of private property, on the sea, in time of war is plausible on its surface, a careful examination discloses a certain amount of fallacy and failure to recognize the true influence of commerce upon war.

It may be presumptuous on my part to enter the lists with the biographer of Nelson and the histographer of the Sea Power of our own country, but while I fully recognize the weight which any statement made by you must necessarily carry, I must beg leave to differ with you, and to call your attention to what I consider, from my examination of the subject, a few errors in your premises.

The term "private property," as it is used in the Memorial now under consideration, does not relate to the *nature* of the property as distinguished between commercial goods and personal effects, but to the *ownership* as distinguishing the property of individuals from that belonging to the State, which, of course, is, and always must be, confiscable; in this respect the contention is that private property consisting of ship and cargo, including commercial goods and personal effects, should be free from the risk of capture exactly the same as all private property, both personal and commercial, which is not contraband of war or necessarily seized for the purpose of maintaining the occupying army, is free from capture upon land, and the ownership thereof sacredly respected and protected under the Articles of War which have been for so many years in force in our own country, and which have formed the model of similar rules in other countries.

The distinction between the rules of warfare upon land and upon sea was evidenced recently, when, upon the capitulation of Santi-

ago, the vessels lying in the harbor, together with whatever merchandise was in them, became the lawful prize of war (whatever the ultimate disposition thereof may be), entailing enormous individual losses upon their owners, while the warehouses upon the land, and all of their contents, remained untouched, and continued to be the property of the original owners without change of title.

Can it be said that this difference in the disposition of the two classes of property had any effect whatever upon the capitulation of Santiago, or the final result of the recent hostilities, or that it had any effect whatever except to show how much farther the rules of civilized warfare have advanced, as to war waged upon the land, than they have as to war upon the sea?

The real fallacy at the present time is in the idea that capture of private property at sea operates as "a humane and scientific process of exhausting the resources of a nation, and so compelling peace," as expressed in the closing paragraph of your letter.

You seem to have overlooked the fact in this connection that, ever since the Declaration of Paris in 1856, when neutral commerce asserted itself with such tremendous force, the neutral flag now covers the enemy's goods, and the enemy's goods are free under a neutral flag, thereby eliminating from the danger of warfare the vessels and goods of neutral nations, and also permitting the continuance of commerce with the enemy through the medium of those nations not involved in the struggle, and whose commerce can now freely supply the belligerent enemy, except so far as contraband of war and the entry of blockaded ports are concerned, in which respect it is not suggested any change should be made, for unquestionably those belligerent rights must be preserved.

That the arguments in regard to the weakening of the enemy's commerce were rendered futile by the Declaration of Paris, was admitted by Sir John Stuart Mill, who, while he opposed the accession of England to the Declaration on the very grounds that you have urged, expressed as his opinion that England should either repudiate the Declaration, or add the fifth rule for

the exemption from capture of private commerce, adopting what has, to the honor of this country, always been known as the American suggestion.

It is unquestionably too late now to abrogate the Declaration of Paris, and the United States, while not a party to the entire Declaration, has practically, and in honor, acceded to the principles therein expressed so far as neutral commerce is concerned.

Even the strong advocates of the continuance of the rule of capture have recently somewhat swerved in their opinion, and it is no longer an admitted fact that England does not recognize, not so much the justice or humanity of the principle, but its advantages from a purely commercial and self-interested standpoint.

Your arguments are all based upon the assumption that we would be the commerce-destroying power. Have you not thought of the fact that we might occupy the position of being the destroyed as well as the destroyer? Professor Hall, who at one time advocated the continuance of the present system, in 1875, in an article devoted exclusively to this subject, admitted that when "two men set fire to each other's houses, he loses the most who has the most to lose," and he also admitted that it was about time for Englishmen to recognize the fact that their tenacity to this rule might in the end be dangerous to themselves.

Sheldon Ames, of London, says that while England has a mercantile marine five times as great as any other state, and a naval force capable of coping with any other two states, she also has a colonial and Indian empire which renders her assailable in every portion of the globe. He deduces from these facts the following conclusions:

"The principal necessities of England's navy is to protect her commerce, defend her coasts, and overpower the enemy; it is obvious that if the navy could be relieved of any one of these functions, so much the more disposable it would be for the efficient discharge of the other two. In other words, if England had not to protect her mercantile marine, her forces would be all the more free to defend her coasts and to overpower the naval forces of the enemy. She would not,

indeed, be able to attack the mercantile marine of the enemy, but as her own mercantile marine is so large, her total gain in exemption from injury would far exceed her loss of power through the restrictions she would encounter. If, again, it be argued that the mercantile marine is a natural source of supply for the navy, and, therefore, must be struck at as a potential arm of the national force, then the value of rescuing such a reserve force is far greater to England than to any other state in proportion to the vastly superior magnitude of the mercantile marine of England."

This argument seems to fit our own case as well as England's, and had we been obliged to cope in the recent war with a power whose naval force exceeded that of our own, would not the duties of the Strategic Board, of which you were a member, and which rendered such efficient aid to the Commander-in-Chief, have been far more extensive and difficult in distributing our own naval forces so as to have efficiently protected our mercantile marine, which is one of the principal duties of our naval force?

Looking at it from another point, does not an equally heavy commercial loss fall upon the individuals of the victorious nation as upon those of the other belligerent? I venture to say that the loss of the American mercantile marine, by reason of goods shipped, either by land, thus injuring the coastwise trade, or under foreign flags, thus injuring our foreign commerce, together with war premiums paid on goods shipped in American bottoms, exceeded the value of all the prizes of enemies' vessels taken under the general rule of war capture, and possibly even including those which were taken while violating blockade.

To-day our mercantile marine is on the increase, reaching out the whole wide world around, and we have a sea coast probably longer than almost any other nation in the world; exceeding twelve, or, possibly, fifteen thousand miles in extent. Our navy will have all that it can do to protect that coast, and to represent us in foreign and territorial ports, and would it not be well to relieve it at once of the additional burden of being obliged to protect our peaceful commerce? War to-day is an exceptional con-

dition of affairs, and yet because it is not impossible, the fact that marine property is subject to absolute confiscation during the war has a depressing effect upon the extension of our commerce, and must necessarily continue to be a depressing factor until it is removed, together with all of the disabilities and disagreeable possibilities which are necessarily connected with it; granting that under the rule existing there might be some possible advantage during war to ourselves, and pushing aside entirely the possibility that we might be the losing party during war, can we not afford to give up what may be a benefit to us, or an injury to our enemy, during the remote period of war, for the greater advantages and benefits which will accrue to our commerce during the longer, and, happily, more assured, periods of peace?

But most of all, and most emphatically, I must differ with you in your statement that the adoption of the rule of exemption would either have any effect in encouraging, or in not deterring, war. War is a paradox, and everything about it is paradoxical. War for humanity's sake sounds ridiculously inconsistent, and yet only recently, as the proclamation which sets this day apart for thanksgivings for the blessings and the victories of the past year declares, "we ourselves were compelled to take up the sword in the cause of humanity," and you yourself aided in producing the successful results of the war which was undertaken for no other purpose whatsoever. Our own Supreme Court has stated that a war is not necessarily waged for conquest, although it results in the acquisition of territory, as was its decision in regard to the Mexican War in the *Castellario* case.

The Red Cross of Geneva and our own rules of war have softened the horrors, and in many instances have eliminated the barbarities of war; the same regulations which permit the complete destruction of resisting towns and the death of all the inhabitants who remain therein exposed to bombardment, provide for the immediate amelioration of the suffering of the wounded, burial of the dead, and preservation of private property as soon as the besieged town shall have surrendered.

Two centuries ago war was almost universal; and no horrors whatsoever prevented the constant clashing of arms; there were no such humanitarian rules, but to confiscation of property was added all the horrors of torture, death and dishonor, and even the talented, learned writers of the day, sustained as Van Bynkershoek did, the right of the conquerer to exercise force of every kind and description in order to subdue the enemy. In fact, this writer, scoffing at the more humane expressions of Grotius, said:

“War is a contest by force—not lawful force, for every force is lawful in war. Thus it is lawful to destroy the enemy, though he be unarmed and defenceless. It is lawful to make use against him of poison, of missile weapons, of fire arms; in short, everything is lawful against an enemy. If we take for our guide nature, that great teacher of the law of nations, we should find that everything is lawful against an enemy as such. We make war because we think that our enemy, by an injury that he has done us, has merited the destruction of men and of all his adherents; as this is the object of our warfare, it is immaterial what means we embrace to accomplish it.”

Any yet when such principles were accepted as the rules governing warfare, there was no such horror of war as exists to-day, with all the ameliorating influences which have been brought to bear upon it. In those days even neutral commerce was not accepted, and there was no possible method by which an enemy's goods were safe under a neutral flag, and yet at that time the danger of confiscation of commerce, no matter how it might be carried on, apparently had no deterrent effects whatever upon the commencement or continuance of hostilities.

It is a remarkable fact that as the rules of warfare have been modified by civilization and humanity, the same influences have increased the aversion to war to a greater extent, and while they have confined war more and more to a condition between state and state, instead of between people and people, the humanizing influences that have developed during the course of the last two centuries have also increased to such an extent that everyone

from a sentimental, as well as from a business point of view, holds it in greater horror now than they ever have done before.

Though many teeth have been drawn from the jaws of the dogs of war, those that remain are sharp enough, and there is yet poison enough in their fangs for their growling to strike terror to the hearts of the bravest; and surely, even with every civilizing influence at work, there will be havoc enough whenever they are loosed to make those who can hold them back think long and well ere they let them slip the leash.

Trusting that you will accept this letter in the spirit in which it is written, and feeling that, however we may differ as to detail, we both have at heart whatever is the best for the world at large and for the honor and strength and safety of our own country, and with expression of esteem and respect, I am

Yours very truly,

CHARLES HENRY BUTLER.



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LETTER ADDRESSED

TO THE

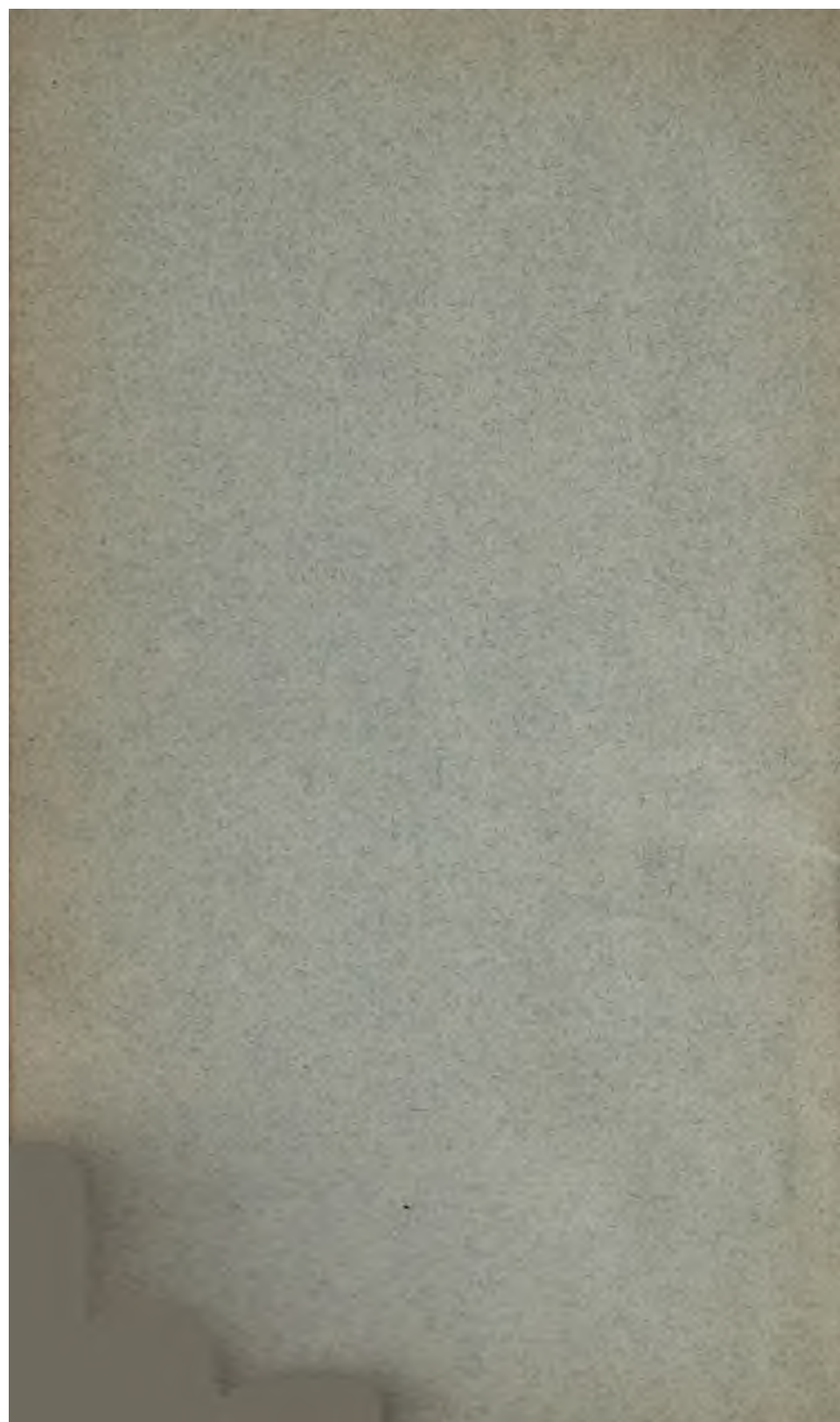
HON. GUSTAV H. SCHWAB, CHAIRMAN, &C.,

IN REGARD TO

FREEDOM OF PRIVATE PROPERTY ON THE SEA
FROM CAPTURE DURING WAR.

BY CHARLES HENRY BUTLER.

WASHINGTON, NOVEMBER 12, 1898.



WASHINGTON, D. C., *November 12. 1898.*

HON. GUSTAV H. SCHWAB,
*Chairman Committee on Commerce, &c.,
Chamber of Commerce of the State of New York.*

MY DEAR SIR:

I note with pleasure that the memorial which was submitted to the President urging him to convene an International Congress at Washington to consider the question of making private property on the sea free from capture during war, and which was also presented to the Chamber of Commerce at its monthly meeting last week, has been referred to your committee, by whom it will undoubtedly receive the full consideration that the subject deserves.

This is not the first time that the Chamber of Commerce has had this question before it; its archives already contain many communications and reports in regard thereto; it has always upheld the interests of American commerce, but it has also always had a due regard to the supremacy of our naval power and the rights of our country on the sea. Its record in this matter is clear, and there can be no doubt but that at the present time its voice will again be heard urging that the United States should take the lead in this reform, which will be of such unquestionable benefit to all mankind.

When Mr. McKinley, just a month ago said in his address at Cedar Rapids, "war has no glories except it achieves them, and no achievements are worth having which do not advance civilization and benefit mankind," he expressed the greatest truth in the fewest words, and how can any greater advance in civilization or benefit to mankind be obtained than by the protection of commerce, and the elimination as far as possible of wanton destruction from the methods of warfare.

As the strongest arguments in favor of the proposition are the history of the movement and the opinions of the able diplomats, jurists, and publicists who have supported it, a brief presentation thereof may be of service to yourself and your colleagues, and I, therefore, take the liberty of supplementing the Memorial with the following statement:

In a valuable compilation of facts relating to, and entitled, *American Diplomacy and What it has Accomplished*, Eugene Schuyler has collated some of the correspondence of 1823 and later, in regard to this subject, and it will be of interest to your committee to consult this volume and the documents therein referred to.

On April 20, 1823, the French Government by royal proclamation declared that, although war then existed with Spain, it was not proposed to capture Spanish merchantmen, and very shortly thereafter a proposition emanated from the Administration of President Monroe, through John Quincy Adams, then Secretary of State, to abolish from hostilities all private war at sea.

Mr. Adams prepared a draft form of convention embodying the principle, and on July 28, 1823, expressed himself to Richard Rush, who then represented us at the Court of St. James, in regard thereto in the following words, which might even now, although uttered three-quarters of a century ago, be repeated to define the position of this country: "The result of the abolition of private maritime war would be coincident with the abolition of maritime neutrality. By this the neutral nations would be the principal losers, and, sensible as we are of this, we are still anxious from higher motives than mere commercial gain, that the principle should be universally adopted. We are willing that the world in common with ourselves should gain in peace whatever we may lose in profit."

Chateaubriand declared on behalf of the French King that could all nations be induced to agree to the principle "his Majesty would congratulate himself on having given the salutary example, and in having proved that without compromising the success of war, its scourge could be abated."

Count Nesselrode, who for so many years controlled the foreign affairs of Russia, expressed himself to Mr. Henry Middleton, our Minister at St. Petersburg, and who so successfully negotiated the treaty of 1824, that "the Emperor sympathized with the opinions and wishes of the United States, and as soon as the powers whose consent was indispensable to make it effective was obtained, he would authorize his Minister to discuss the different articles of an act, which would be a crown of glory to modern diplomacy."

Great Britain declined to negotiate at that time, and also in 1826, when Mr. Gallatin, and in 1828, when Mr. Barbour, endeavored to revive the matter; in fact there has always been a great diversity of opinion in England on this subject, but many of her ablest diplomats and jurists have favored the abolition of the capture of peaceful commerce.

The correspondence of 1823 demonstrates the impossibility of effecting this reform, except by a general international movement, but during the past fifty years there have been many individual instances in which the principle of freedom of private property has been recognized, notably as follows:

In the war with the Crimea in 1856, private property was exempted from capture by all the powers; in 1865, Italy passed a maritime code forbidding the capture of mercantile vessels of all hostile nations, provided reciprocity in that respect were observed by the other belligerents, and the rule was observed in the war between Italy and Austria in 1865; Italy and Prussia, although at war in 1866, mutually agreed not to capture non-combatant merchantmen; in 1870, the Prussian Government issued an ordinance exempting French vessels from capture, and for a year acted upon it, and only altered the rule after France resorted to the ancient custom.

During the civil war our commerce was crippled and our merchant marine almost destroyed by the ravages of the Confederate cruisers and privateers; the loss to our commercial interests at the close of the war extended to both sections of the country, not only owing to the enormous amount of tonnage which had

been destroyed, but also to the great number of vessels which had been transferred to other flags to avoid danger of capture, and which, instead of proving to be a temporary expedient, resulted in a permanent condition, so that we have never regained the commercial prestige which we enjoyed before the war.

No greater evidence can be produced of the uselessness of private war and its unfortunate results than those destructive methods employed during the civil war, which certainly did not change the ultimate result, but which did ruin many private citizens in the North, while no good was wrought thereby to the Confederacy, and which also by reason of her negligence in regard thereto cost England millions of dollars under the Geneva arbitration.

Had this country been able to carry out the unselfish methods expressed by Mr. Adams in 1823, by how many hundred fold would the bread then cast upon the waters have returned to us?

It is, however, by no means certain that Great Britain will at the present time oppose this movement. Her great men have been thinking, and many of them have expressed themselves as greatly in favor of it.

Professor W. E. Hall, one of the most eminent publicist on subjects of International Law in Great Britain, has discussed the position not only of England, but also of all the other nations, as to this proposed change in an article published in the *Contemporary Review* for October, 1875, in which he declares that Germany, Russia, Italy and the United States are in favor of the rule, supported by Bhuntschli, Calvo, Jaquemyns, Pierantoni, Ahrens, Lawrence, Woolsey and a crowd of other authorities who unite in advocating or approving the change of doctrine, and whose opinions extend far beyond the limits of their own country, while England stands alone with France in adhering to the ancient doctrine."

In the same article, after giving a number of interesting statistics, he says: "If two men set fire to each other's houses, he is apt to lose most who has most to lose. The custom of seizing private property at sea appears in fact to be of more and more

doubtful advantage to England * * * Englishmen still cling to the belief that victory is bound up with the capture of private property at sea, and they repel the bare suggestion of yielding a right which they regard as a condition of their greatness. In both cases sentiment and prejudices are the true foundation of their views, and neither sentiment nor prejudices are safe advisers of national policy. It is time now for Englishmen to clear their eyes from the mists of lazy thought and look facts steadily in the face. Let them beware lest they are obstinate when they ought to consider, and yielding when they ought to be firm."

It would be impossible to collate in the brief space of time at my disposal all of the opinions that have been expressed by the eminent publicists and jurists who have considered this subject, but a few more can possibly be quoted at the present time to some advantage.

John Westlake, the well-known professor of International Law at Cambridge, England, after presenting both sides of the case, sums it all up with the statement that capture ~~of~~ private property on the sea "on no other legal ground but that of enemy's property, is, in fact, whether consistently or not, condemned as unjust throughout a large part of Europe and America." On a subsequent page he expresses the hope that the Declaration of Paris might be extended by placing private belligerent property at sea on the same footing as that of neutrals.

In a recent book published by John S. Risley on the laws of war, he devotes a chapter on the relations of England to the Declaration of Paris, and as one of the ardent advocates of the principle of capture, he goes so far as to hope that England will repudiate eventually all of the principles contained in that declaration of neutral rights which marked one of the great forward steps of progress and civilization. Surely the opponents of the proposed reform must indeed be *in extremis* when in order to prevent its adoption they would relegate us to the ante-declaration days when even neutral property was not exempt from the ravages of war.

The subject has more than once been debated in Parliament, notably in 1856, after the promulgation of the Declaration of Paris; in 1862, on Mr. Horsfall's motion; in 1871, when the treaty of Washington was under consideration; and in 1878, when Sir John Lubbock made his great address in favor of extending the Declaration by adding the rule exempting private property, so that it might be adopted, as thus amended, by all of the civilized world, and in the course of which he said "England's greatest interest was not only the peace, but the prosperity of the world. A selfish policy is not only wrong, but foolish. We often do ourselves an injustice by the way we speak of British interests. The country would, by overwhelming majority, give up any claim which could be clearly shown to be unjust or injurious to the general interests of mankind."

In the same address quotations and references can be found to the favorable arguments of Mr. Baring, Mr. Cobden, and of Sir John Stuart Mill, who, while he regretted that England had "acceded to the Declaration at all, considered, that this having been done, it was an actual necessity to take the second step and obtain the exemption of all private property at sea from the contingencies of war."

In Hansard's debates for 1878, Mr. Gourley's statement to the effect that he was in favor of abolishing the capture of private property at sea follows Sir John's address, and is full of interesting statistics; he also maintained that this policy "was the only correct, safe and sound national policy which could be adopted by a great commercial country, such as Great Britain."

Sir Vernon Harcourt opposed the proposition, and was also in favor of abrogating the Declaration of Paris. Mr. Grant Duff, in answering Sir Vernon, and quoting from a speech of the Hon. John Bright made in 1862, asked the very pertinent question which can well be asked to-day, and which it is trusted your committee will have no hesitancy in answering: "What are we to do now, are we to go forward, backward, or in what direction?"

During the great Parliamentary debates on this subject

numerous pamphlets appeared on both sides of the question; one of them anonymously published "by a lawyer" closed with the following sentence, which might well be taken as the sentiment of the people who, as Mr. Bright himself stated in the debate of 1862, were in favor of the protection of private commerce:

"If then, it be true that war, barbarous and lawless as it must ever be, has yet been so limited and regulated by advancing civilization that the practice of capturing the private property of an enemy at sea is now the last anomalous relic of a number of similar barbarous practices; if it be also true that this practice can have little or no effect on the general result of war, whilst it inflicts enormous and partial injury on certain harmless individuals; if it be further true that this practice is demoralizing and discreditable to the honorable profession engaged in it, is it not time that the civilized nations of the world unite to put it down? And if it be also true that England, of all nations, is the one whose subjects will gain the least and suffer the most by its continuance, is there not good reason why she should be the first to propose its abolition, and thus repel the censure, too justly cast upon her, of having been the strongest supporter of extreme belligerent rights, and the last to admit the growing influence of those humane laws by which advancing civilization has mitigated the horrors of war?"

The United States have always adhered to the principle first announced by Franklin in 1785, and embodied in our treaty with Prussia that private property should be free, and have always been ready to enter into such arrangements. Besides the instances already referred to, there have been numerous other occasions on which this sentiment has been expressed.

In 1858, when the treaty with Bolivia was concluded the provisions as to privateers were qualified by the expression in Article IX, that its provisions should remain in force "until the two high contracting parties may relinquish the right of that mode of warfare in consideration of the general relinquishment of the right of capture of private property upon the high seas."

The Twelfth Article of the treaty of 1871 with Italy provides that in the unfortunate event of a war between this country and Italy, "the private property of their respective citizens and subjects, with the exception of contraband of war, shall be exempt from capture or seizure on the high seas or elsewhere by the armed vessels of by the military forces of either party; violations of blockades, however, being of course excepted from the operation of the rule."

In 1870, Secretary Fish expressed the hope to Baron Gerolt that "the Government and people of the United States might soon be gratified by seeing this principle universally recognized as another restraining and humanizing influence imposed by modern civilization on the art of war.

In considering this subject it must be distinctly borne in mind that none of the rights against active belligerents will be affected. It is not suggested in any way to abrogate the right of search as it now exists, both under International Law and by special treaties between most of the civilized powers, or in any way to prevent the right of blockade or capture for the violation of an effective blockade, or of contraband of war, nor yet of any vessel performing any unneutral service.

So long as war exists these belligerent rights must, and should, be preserved, but the proposition is simply to eliminate from the danger of capture, destruction and confiscation all property, both vessel and cargo, which is not in any way actively engaged in the prosecution of the war. That is to say, to afford to non-combatant owners of property upon the sea a corresponding protection to that which is afforded by the present rules of war to non-combatant owners of property upon the land. The only argument which is advanced against the proposition is that the destruction of commerce of the enemy weakens the enemy's resources, and thus sooner effects complete subjugation. This same rule, however, could apply to destruction of property upon land, but civilization has resulted in a general consensus of opinion that subjugation by such means should not be permitted, and the doctrine which Schuyler says was announced by England at the

outset of the Crimean war, that operations would be confined as far as possible to the organized military and naval forces for the enemy is a principle that can well be re-established and adopted by all the civilized nations of the world, and by so doing eliminate from the terrible consequences that war must ever entail, that great element of suffering which is caused by capture, confiscation and wanton destruction of private property and the lives and liberty of non-combatants.

Those who would argue in favor of continuing the capture of private property on the ground that war is more quickly concluded if more fiercely waged, must be content to follow that argument whithersoever it will lead them, for, if by this wanton destruction and consequent weakening of the enemy, war is terminated more quickly, and so humanity is benefited thereby, then let us at once abolish the rules adopted by civilized nations preventing pillage, torture, rape and wholesale destruction on land as well as sea. Let us emulate the example set by Alva in the Netherlands and by the French in the Palatinate three hundred years ago; let us disregard all that has been accomplished by the great army of writers on the subject of International Law, starting from Grotius, who, in 1625, surprised the world by demonstrating that there was no paradox in the assertion that war could be regulated by rules of humanity; let us abolish the Red Cross of Geneva and substitute some banner for warfare on land that will correspond to the piratical emblems of the cross-bones; let the European prohibition of explosive bullets be abolished and all the ancient methods of warfare be reinstated.

To the United States is largely due the adoption of regular rules by the great powers for the proper conduct of armies in the field. The code known in the War Department as General Order No. 100, of 1863, was prepared for that purpose during the civil war by Dr. Frances Lieber, under instructions of President Lincoln, and has been in force ever since in this country, and has formed the model for corresponding regulations of the armies of other nations.

The rules most emphasized are those which prevent unnecessary destruction or confiscation of private property, and when

necessarily taken or destroyed provision is made for the proper indemnity of the sufferers if they have conducted themselves as noncombatants.

Why should not the rules of war protect property of the non-combatant citizens in the hold of his vessel on the sea as well as in his storehouse on the land?

While this great purpose cannot be accomplished by any single individual, no matter how strong he may be; by any single organization, no matter how influential it may be; or even by any single nation, no matter how powerful it may be, it can and will be achieved if all who are interested in its final accomplishment will earnestly and diligently unite their efforts for the common end sought by all, and will constantly and steadily continue so to do until the final result shall be, as it eventually must and will be, achieved. The work may well be likened to the rolling of a great heavy stone up a steep and rugged hill for a noble edifice there to be erected. Before the summit can be reached there will be many obstacles to overcome, that seem at times insurmountable, many slip-backs, where the ground gained after much effort appears to have been irretrievably lost, but hopeless as the task may seem at times, sooner or later, with strength, unison and labor all obstacles will be overcome, and from the height finally reached a grand view will be obtained, not only of the difficulties surmounted in the past, but of the good that has been obtained for humanity in the future.

In this instance, and at this time, it seems as though the stone had not only rolled back a space, but had also become for a while hidden, as it were, in the brush by the way, and if I have done no more than draw it to the attention of those who can set, and keep, in motion the strong levers and machinery, by which this great rock of reform can once more be started on its onward and upward course towards the goal of consummation, which it is sure to reach, my time and labor will not have been expended in vain.

Thanking you for the consideration you have already given to this matter, I remain

Yours very truly,

CHARLES HENRY BUTLER.

These three pamphlets were
presented to the library by the Secretary
of the U. of M. Alumni Association
of Chicago Dec. 2, 1898

A MEMORIAL

TO THE

PRESIDENT OF THE UNITED STATES

URGING HIM TO CONVENE AN
INTERNATIONAL CONGRESS AT
WASHINGTON, TO CONSIDER
THE QUESTION OF MAKING PRI-
VATE PROPERTY ON THE SEA
FREE FROM CAPTURE DURING
WAR.

NOVEMBER, 1898.



To the President.

Your memorialists respectfully call to your attention and submit for your consideration the following statement, and in view of the fact that to-day the United States pre-eminently command the respect of the entire world, especially in regard to matters relating to the mercantile and naval marine, suggest that this is the proper time to take the action referred to in this memorial.

During its entire existence this country has been the champion of the freedom of commerce and the rights of neutrals and of non-combatants upon the sea, and to-day an opportunity exists which should certainly be availed of, to assert that championship with such power and effect that from this time forward the United States will have the benefit and the glory of having freed the ocean from the scourge of war, so far as private property is concerned.

We have just passed through the experiences of war; in this case of war forced upon us and which we would have avoided had we been able to do so; our position, however, was so proper, our cause was so just, and the objects to be attained were of such paramount importance to the world at large, that, notwithstanding ties of neighborhood, financial interests and racial connections, not one of the powers of the world saw fit to interpose or even protest against our course; so ably

were our military and naval operations conducted under your administration as Commander-in-Chief, that the issue was never for a moment in doubt, the only question was one of time, and in the incredibly brief period of less than four months our victories on land and sea resulted in the one thing for which we took up our arms—Peace, with honor and safety for ourselves, and liberty for our neighbors, whom, in the name of justice, civilization and humanity, we were bound to assist.

In two of the greatest naval battles recorded in history we not only completely destroyed our adversary's fleets, but did so with such little loss to ourselves, and by the use of so small a portion of our naval resources that we compelled the admiration and respect of the world and effectually demonstrated that our navy to-day is not outclassed by that of any other power.

For three-quarters of a century this country has urged the adoption of the rule that all private property, whether belonging to neutrals or non-combatant enemies, should be free from capture unless contraband of war or seized while violating a blockade. Such a rule cannot be adopted except by a general treaty entered into by all the maritime powers, and as this country has not been able to obtain such co-operation it has been unable to adopt it; no one can suggest that this Government can have any selfish motive for abolishing a custom which has so lately accrued to our benefit, and, therefore, this is the proper time for you, as President of the United States, through the proper channels of the State Department, to invite all the Maritime Powers of the world to an International Congress to consider and formulate rules for the freedom from capture of private property on the sea, whether belonging to neutrals or non-combatant citizens of belligerent nations, except in the case of contraband of war or violation of blockade.

Such a conference could not fail to inestimably benefit mankind. Every forward step of civilization, so far as the mitigation of the evil effects of war is concerned, has been taken after the termination of a war; the Declaration of Paris has for forty

years linked the name of that city with a great advance in the freedom of commerce. After the Austrian-German War the Red Cross of Geneva was instituted; the Geneva Award fixing the liability for breaches of neutrality was the outcome of our own Civil War; the Conferences at Brussels and St. Petersburg and the efforts, to some extent successful, to regulate the rules of war resulted from the Franco-Prussian War of 1870; let the struggle of 1898 give evidence, not only of the supremacy of our army and our navy, but also of our desire and ability to uphold the cause of civilization, humanity and justice on the sea as well as on the land, and the name of our Capital as well as of our Government and your Administration will always be connected with the still greater advance which must inevitably result from the declarations of such a Congress at this time.

On the cessation of hostilities you gave signal evidence of the wisdom which has guided the affairs of this Nation, by appointing as the representatives of this country men most eminently fitted for the mission which they have undertaken, and who meritedly command confidence at home and respect abroad. While the world watches their proceedings in framing the treaty of peace which shall forever blot out oppression and tyranny from some of the fairest spots in the East and in the West, let it also see that we are mindful not only of the interest of ourselves and our immediate neighbors, but also of the world at large.

In suggesting this Congress it is proper to briefly review the position which the United States have always assumed towards the freedom of commerce, especially in regard to the exemption of private property from capture, and also to show that the course pursued during the recent war is not in any way inconsistent with supporting the rule to make such property free.

For more than a hundred years a process of evolution has been in progress which must eventually result in the complete freedom of commerce, and the most important factor in that

process has been the steadfast position which the United States has always taken in behalf of such freedom.

In 1778, even before we had achieved our independence, the doctrine that "free ships make free goods" was incorporated into our commercial treaty with France, and in 1780 we announced our adherence to that doctrine as a matter of international law and not of treaty stipulation, and offered to unite with the Armed Neutrality which had been organized to support that principle by the Empress Catherine of Russia.

The principle of freedom of enemies' property in enemies' ships, however, can never be made an element of international law, except by a universal treaty, or one in which all of the most powerful maritime nations will unite, for from time immemorial, under all the recognized rules of warfare, such property has always been subject to capture, and only universal consent can now protect it, and for that reason the United States, in the recent war, captured vessels sailing under the enemy's flag, as there is no doubt whatever that Spain would have captured our merchant vessels had she been able to do so.

We have, however, on many occasions endeavored to eliminate the capture of private property on the sea by special treaty clauses, as happened in 1823, when Mr. John Quincy Adams, then Secretary of State, offered to incorporate such stipulations in our treaties with England, France and Russia; England declined, France and Russia, however, expressed their willingness to unite in a universal agreement to that effect, but considered it impracticable to adopt the rule under treaties separately contracted, and the impossibility of enlisting the sympathy of England caused a cessation of effort for a time on the part of our Government, although the principle was to some extent recognized in our treaty with Bolivia, and fully recognized as between ourselves and Italy in the existing treaty of 1871.

Meantime the question of privateering assumed great and disagreeable international proportions, and hand in hand with

the development of commerce went the increased power of these legitimatized but really piratical free lances of the sea, alike destructive to the commerce of the enemy and demoralizing to the nation employing them. Disastrous and demoralizing as it is, however, privateering so far as international law is concerned, is perfectly legal, and has only become illegal as to the nations which united in the Declaration of Paris or which have since announced their intention of adhering to the principle of abolition. While the physical position of this country has entirely changed during the past fifty years in regard to privateering, as a matter of fact, we have never permitted it, except as an adjunct to our own navy, and for the protection of our own commerce, and our neutrality laws, originally enacted in 1797, thus antedating those of all other nations, and, in fact, forming the models for those of other countries following our example, have always effectually forbidden and prevented our citizens from accepting letters of marque to prey upon the commerce of any nation with whom we were at peace, and from fitting out or harboring in our ports any vessels for such purpose.

In 1854, when the Crimean War broke out the belligerents were forced by public opinion to recognize the principle of "free ships make free goods"; and they also further announced that neutral goods (not contraband) would be exempt on enemies' ships, that operations would be confined to organized military and naval forces of the enemy, and that privateering would not be resorted to. This was certainly a great step in the right direction, but the announcements were accompanied with distinct reservations that the rights enumerated were waived for the time being only, and, therefore, no changes were wrought in the rules of international law generally applicable to other nations, or even to the proclaiming nations themselves, in regard to other wars.

The announcement, of course, resulted in correspondence with the United States, and while this action of the powers might seem to be a great victory for the principles which this

country had advocated so strongly, Mr. Marcy, then Secretary of State, did not so regard it, and, in a despatch, regretted that the announcement confined the rules to the existing occasion, and insisted that they should have been announced as universal and unlimited principles and not merely as temporary concessions.

Fortunately this country was not involved in the war of the Crimea; it was not, therefore, represented in the Congress that met at Paris in 1856 to arrange the treaty of peace, nor did it participate in formulating the rules announced in the Declaration, which was simultaneously signed by the same powers.

As is well known, that Declaration is one of the briefest and most important and far-reaching diplomatic documents in existence, and the rules laid down are short, concise and explicit. They are as follows: *First*, Privateering is and remains abolished; *Second*, The neutral flag covers enemy's goods, with the exception of contraband of war; *Third*, Neutral goods, except contraband of war, are not liable to capture under an enemy's flag; *Fourth*, Blockades to be binding must be effective—that is to say—maintained by a force really sufficient to prevent access to the enemy's coast.

England, France, Russia, Austria and Sardinia were the only powers originally signing this declaration, but by one of its clauses all other maritime powers were to be notified and invited to give adherence to the principles enunciated and many of them did so. This adherence, however, was only to be accepted if given *in solido* as to the four rules and not as to any of them separately.

The United States were at once notified and their acquiescence requested and much surprise and disappointment was expressed at the refusal of Mr. Marcy to give the expected consent; to many his action then and has since, seemed inconsistent and improper in view of the position assumed by this country. Such, however, was not the case, he was perfectly consistent; in fact, he offered, on behalf of this country, to accede to all the rules except the first, and not to except even that if

another were added making all private property free from capture except contraband of war.

At that time our merchant marine was one of the largest in the world, but our navy was disproportionately small, and while ready, under neutrality laws and treaty stipulations, to prevent privateering by our citizens against other nations, our Government very properly felt unauthorized to relinquish a lawful right of war to use our own merchant vessels to protect our own commerce unless such commerce were exempted from capture. This view has been lost sight of by those writers on maritime law who blame our Government for the course then pursued, but in this they are mistaken; two years before the Declaration was promulgated President Pierce formulated our position in his message of 1854, as follows: "The proposal to surrender the right to employ privateers is professedly founded upon the principle that private property of unoffending non-combatants though enemies should be exempt from ravages of war. * * * Should the leading powers of Europe concur in proposing as a rule of international law to exempt private property upon the ocean from seizure by public armed cruisers as well as by privateers the United States will readily meet them upon that broad ground."

Forty-two years have elapsed. The increase of our great navy and the present uselessness of privateers have entirely eliminated that question, but non-combatant commerce has not yet been protected. During that period there have been many wars, in the course of which millions of dollars worth of property has been ruthlessly destroyed or confiscated without in any way affecting the issues of the war, but simply bringing ruin upon the innocent owners. In the Franco-Prussian war of 1870 an attempt was made by one of the belligerents to protect non-combatant commerce, but the protection was eventually withdrawn on the claim that it was not properly reciprocated by the opposing power; it never will be possible or practicable for any belligerent to adopt the rule until it becomes, as it eventually

will become, a positive rule acknowledged by every maritime power.

To-day all the European powers have enormous navies, and during the past six months the world has learned how terribly destructive naval warfare not only can, but necessarily must, be. Should a war break out in Europe, which event unfortunately is not impossible, it would undoubtedly, on account of the numerous existing and entangling alliances, be so general that few of the powers could maintain their neutrality, and the destruction of private property and the resulting paralysis of commerce would be terrible, unprecedented and irretrievable. Such a result, it may possibly be said, would benefit rather than injure our own commerce, but if that were true it would simply be another reason why this country is the proper power to convene the Congress that could by international agreement avert such a catastrophe.

We have never stood before the world in this matter in a stronger or better position than we do to-day. Had we suffered during the last few months, were it likely that we would suffer during a European war; or not be benefited under the present rule it might be possible to accuse us of selfishness, but under the existing circumstances no such motive can possibly be imputed, and we are in a better position than any other power to assume the leadership in this march of progress.

If the United States under your Administration shall effect this great reform it will not be the first time they have benefited the commerce of the world. History has recorded the influence, ability and successful efforts of Webster, Marcy, Seward, and many others too numerous to mention, whose despatches render the records of our State Department so interesting and instructive, in regard to freedom of neutral ships and neutral goods, suppression of paper blockades, abolition of illegal and onerous sound dues, opening of navigable rivers from which foreign powers sought to exclude our commerce, and improvement of the regulations and rules of the road at sea.

